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COLE, RAYWID & BRAVERMAN

ATTORNEYS AT LAW
SECOND FLOOR
1919 PENNSYLVANIA AVENUE, N.W.
WASHINGTON, D.C. 20006-3458
(202) 659-9750

JOHN P. COLE, JR.
BURT A. BRAVERMAN
ROBERT L. JAMES
JOSEPH R. REIFER
FRANCES J. CHETWYND
JOHN D. SEIVER
WESLEY R. HEPPLER
PAUL GLIST
DAVID M. SILVERMAN
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STEPHEN L. KABLER
FREDERICK W. GIROUX
MATTHEW P. ZINN
JOHN DAVIDSON THOMAS
MARIA T. BROWNE
BENJAMIN E. GOLANT
THOMAS SCOTT THOMPSON
TODD G. HARTMAN+

* ADMITTED IN PENNSYLVANIA ONLY
\+ ADMITTED IN MINNESOTA ONLY

ALAN RAYWID
(1930-1990)

CABLE ADDRESS
"CRAB"

TELECOPIER
(202) 452-0067

July 11, 1994

Hon. Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Ex Parte: MM Docket No. 92-265 - - Program Access

Dear Chairman Hundt:

We are counsel to Superstar Satellite Entertainment, which serves the TVRO market as both a satellite superstation programmer and a multichannel video program distributor ("MVPD"). As a superstation programmer, Superstar was a pioneer in granting MVPDs easy access to superstation signals. As a distributor, Superstar is the largest program packager in the C-band satellite business.

Over the past few months, you have received numerous submissions concerning prior requests for reconsideration of the Program Access Rules adopted last year and published in 47 C.F.R. §§ 1000, et seq. In particular, we are troubled by a recent *ex parte* letter from the firm of Hardy & Ellison on May 24, 1994, arguing for the inclusion of a damage remedy and attorneys' fees in the section of the Rules governing program access complaints.

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<u>Summary</u>

In adopting its program access rules, the Commission already considered and properly rejected such damage awards. Program access complaints are being filed, processed and resolved by the Commission. In short, the complaint process is working.

In its rules the Commission has made the program access complaint process extremely simple. Anyone can easily file a complaint even without an attorney, and the Commission's staff will effectively process that complaint. Indeed, the complaint process is now so simple that it encourages any program distributor negotiating contract rates to file a complaint simply for purposes of negotiation. Permitting attorneys' fees and additional damage awards will only encourage attorneys and complainants to bring more and more complaints and there will simply be no check on this process. The Commission will be flooded with complaints that have no basis under the law, but may be useful for the complainant to gain undue advantage in contract negotiations. Furthermore, it would be unconscionable and unprecedented to award damages and attorneys' fees in cases of first impression before the Commission under the new law. The current penalties including rate reductions, forfeitures and the high cost of participating in rate proceedings before the Commission is more than enough incentive to ensure compliance with the program access provisions of the Cable Act.

The Hardy and Ellison letter makes unfounded and unsupported allegations regarding rate differentials between cable and the TVRO market. There are already sufficient remedies under the Commission's rules to address any alleged grievances in this area. It is inappropriate to argue in *ex parte* letters to the Commissioners that additional penalties should be imposed in such cases.

<u>Appropriate Remedies Under the Program Access Rules</u>

Superstation programmers such as Superstar face a unique situation since entry into their market is completely open and unimpeded. Unlike other program networks, the superstation programmers have no proprietary rights in the programming. Anyone willing to make the necessary investment in a satellite uplink and transponder can distribute superstations.

Nonetheless, Congress included superstation programmers within the reach of the program access provisions, but wisely limited the available remedies. In the Commission's rulemaking proceeding some parties argued that the Commission should expressly include damage remedies for price differentials in violation of the program access rules. In its Report and Order, the Commission correctly found that in most cases, only amendments to the agreement will be the appropriate remedy and that at most, forfeitures under Title V would be appropriate.[1] It has been argued that because damages for violation of the Title II common carrier antidiscrimination provisions could be awarded, the Commission should be able to award damages for violation of program access. That argument is misleading.

First, Congress did *not* direct the Commission to employ Title II remedies. Although Congress authorized the Commission to order "appropriate" remedies, including the power to establish prices, terms and conditions, in 47 U.S.C. § 628(e)(1) Congress granted authority to the Commission to utilize only those "additional" remedies available under Title V, or any other provision of *this* Act. 47 U.S.C. § 628(e)(2). Because none of the programmers are "common carriers" subject to Title II, none of Title II's damage remedies are "available".

Second, damage awards in a Title II common carrier proceeding do not include the types of awards Mr. Ellison's clients would like under the program access rules. In common carrier proceedings damages are not calculated as the difference between the rates charged to the complaining distributor and similarly situated competing distributors. The "difference between one rate and another is not the measure of damages. . . ".[2] The actual measure of damages in a common carrier proceeding is limited to the particular profits which are lost due to customers subscribing to a competitor's service.[3] Mr. Ellison's clients, on the other hand, want the distributor to be able to recover the difference between the rate paid for programming and the rate the "favored" distributors paid, regardless of lost profits. Significantly, many of these same distributors have not passed on their cost savings to their customers. It would thus be wholly inequitable to force the program vendors to underwrite the distributors' profit margins by charging lower prices, while at the same time the distributors do not pass the savings on to their customers. Accordingly, because price

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[1] In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, 8 F.C.C. Rcd. 3359, 3420 (1993).

[2] I.C.C. v. United States, 289 U.S. 385, 389 (1933); Illinois Bell Telephone Co. v. American Telephone and Telegraph Co., 66 RR2d 919, n. 13 (1989).

[3] I.C.C., 289 U.S. at 390.

differentials are not damages under Title II, the entire argument supporting the inclusion of a Title II damage remedy is without justification.

Moreover, refusing damage awards makes eminent sense. Here, the cable and TVRO services are "unlike" ("likeness" being another prerequisite for recovery in a common carrier proceeding) and it would be purely speculative to assume that the price of programming charged to a distributor alone caused a customer not to subscribe to a particular technology for delivery of programming.[4] Accordingly, awarding damages -- even as "lost profits" -- would be purely speculative and not based on any business or market evidence. Most likely, a damage remedy would have the *in terrorem* effect of multiple complaints against multiple programmers, forcing a settlement regardless of entitlement to lower rates.

Indeed, Mr. Ellison has indicated that his firm has already submitted "ten-day notice letters" to several programmers and intends to send such letters to a number of other programmers. The additional award of a damage remedy will only encourage such complaints, rewarding litigious distributors who need only file a short complaint with the Commission to avail themselves of lower rates. What Mr. Ellison fails to indicate is that far from "running into stone walls fortified by the fact that the programmers have little or no incentive to negotiate" is an undeniable fact that Superstar, as many other programmers, have discounted their rates 15 - 40% as a result of program access implementation. Apparently, for some distributors, that is simply not enough.[5]

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[4]Throughout the Comments in the underlying proceeding, the program vendors demonstrated that delivery of signals to cable operators is not "like" the service provided to HSD distributors who simply authorize billing and collect for services that carriers directly provide to HSD owners. To the extent that program access rules determine the degree of "likeness" the purpose of comparison, the rules still provide justification for price differentials based on "offering of service," 47 C.F.R. § 1002(b)(1). As set forth in the comments and as set forth in the prior complaint proceedings, the additional costs and risks in serving the backyard dish market, including additional investment necessary to technically deliver, market, and make the service successful, differentiate the services that are being provided.

[5]These distributors should also be attentive to the thrust of the *ex parte* rules. Proceedings become "restricted" if a party intends to file a complaint. 47 C.F.R. § 1.1208(b)(2). If these distributors live up to their statements on the record, complaint proceedings will be instituted. It would mock the *ex parte* rules now if, in the reconsideration of the program access rules that will apply to the disposition and resolution of those complaints, potential complainants could lobby for additional remedies.

Superstar is highly respected in the backyard dish market, and has led development of that market from the time of inception in 1987. Superstar took tremendous business risks and invested substantial time and resources in developing this market and making its programming available to all distributors at fair prices. Maximizing distribution is clearly in Superstar's interest, and the complaints of a few distributors who seek to have a few more pennies reduced from their rates ring hollow when they have failed to reduce their prices to their subscribers.

The fear of large damage recovery is unrelated to any expected or predicted harm and will simply force program vendors to give in to all complaining distributors. Superstation programmers face competition at the program creation and distribution levels of their business. There is no reason why the vendors should be further constrained by the threats of multiple damage awards from distributors complaining of discrimination but benefitting from substantial discounts.

Respectfully,

John D. Seiver

cc: William F. Caton (2 copies, pursuant to *ex parte* rules)
Commissioner Andrew C. Barrett
Commissioner James H. Quello
Commissioner Susan Ness
Commissioner Rachel B. Chong
Diane Hofbauer
James Coltharp
Rosalee Chiara